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No. 92-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Supreme Court,
FILE
MAR 17 1993
OFFICE OF THE CLERK

IMAGINEERING, INC. and KNIGHTEN BROS. CONSTRUCTION CO.,

Petitioners

v.

KIEWIT PACIFIC COMPANY; KIEWIT CONSTRUCTION COMPANY; and PETER KIEWIT SONS', INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit

REPLY BRIEF OF PETITIONERS

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The petition explained why this case raises important, recurrent questions regarding the pleading requirements of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). 18 U.S.C. § 1964(c). In the decision below, the court of appeals erected substantial

new barriers to RICO standing that do not exist under the identical language of the Clayton Act, 15 U.S.C. § 15. Respondents' belabored defense of the judgment below does little to dispel the conclusion that the lower courts are adrift without this Court's guidance. Indeed, respondents' submission confirms the need for further review by this Court in two significant respects. First, respondents' principal defense of the decision below relies on *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), a case neither cited nor discussed by the Ninth Circuit. Respondents' protracted argument on this point underscores that the decision below cannot stand on its stated terms.

Second, respondents' overly simplistic contention, based on *Illinois Brick*, that those who suffer "direct" injury have RICO standing while those who suffer "indirect" injury do not, merely masks the critical issue presented by the petition. Respondents' submission offers nothing more than the truism that a plaintiff whose injury is proximately caused by the defendant has standing, but a plaintiff whose injury is not proximately caused lacks standing. As the petition explained, the issue dividing the lower courts is not over the correct disposition of a case once the appropriate label has attached. Rather, the operative conflict in this area of the law is on how claims are to be characterized in the first instance, before the case-dispositive label attaches. By substituting labels for analysis, the brief in opposition highlights precisely where the instructive guidance of this Court would be most beneficial.

1. Respondents' argument that *Illinois Brick* bars petitioners' claims employs an invalid analogy and a mischaracterization of the complaint. The "passing on"

defense recognized in antitrust price-fixing cases does not apply to the injury suffered by petitioners as a result of their exclusion from the public construction market.

This case was brought on behalf of a class of minority- and women-owned business enterprises (MWBEs) excluded from participating in public construction projects as a direct result of Kiewit's unlawful scheme to circumvent minority set-aside requirements and to obtain contracts by subterfuge. MWBEs, the intended beneficiaries of the set-aside provisions, suffered injury in two principal ways. First, respondents' fraudulent scheme totally foreclosed legitimate MWBE participation in contracts awarded to and performed by respondents.[1] Second, respondents' fraudulent scheme precluded legitimate MWBE participation in contracts that, but for the fraud, would have been awarded to lower-priced, complying bidders.[2] In their brief in opposition, respondents' address only the latter form of exclusion, which they label "indirect" and thus dismiss as incapable of conferring standing. But respondents ignore the former

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[1] Rather than comply with the governing set-aside regulations, respondents opted to shut MWBEs out of the process by utilizing conduits, pass-throughs and fronts. Petitioners' initial complaint identified 11 public works contracts obtained by respondents without compliance with set-aside regulations. Complaint, ¶ 18, CR:1. The complaint further alleged that petitioners had submitted bids to respondents for subcontract work on such projects (*id.* at ¶¶ 28, 29) and that respondents' unlawful scheme "reduces the opportunity for legitimate [MWBEs] to participate with public works contracts awarded to [respondents]." *Id.* at ¶ 13.

[2] Petitioners' amended complaint alleged specific public works contracts awarded to respondents on which petitioners were expressly identified on bids submitted by the lowest-bidding prime contractor that complied with set-aside requirements. Pet. App. A4, A26.

type of exclusion, which even under their terminology would constitute "direct" injury and would confer standing. Equally as important for present purposes, respondents' "passing on" analysis is irrelevant to claims of exclusion and particularly so with respect to the direct type of exclusion alleged in this case.[3]

Illinois Brick arose, and has been applied, in antitrust price-fixing cases where indirect purchasers sought to measure their damages by the amount of the unlawful overcharge "passed on" to them. Unlike *Illinois Brick* and its progeny, however, this case does not involve allegations of price-fixing or multiple claims for the same overcharge by successive purchasers in a vertical chain of distribution. This case does not involve overcharges at all, and thus does not raise the concerns that were central to the holding of *Illinois Brick*. Rather, petitioners' claims are based upon their exclusion from participation in the public construction market. Petitioners have suffered a unique and distinct injury -- their exclusion from business -- as a direct result of respondents scheme to circumvent the set-aside regulations. The injury suffered by the proposed class of MWBE subcontractors was not "passed on" by anyone. In *Blue Shield v. McCready*, 457 U.S. 465, 474 (1982), this Court recognized the limited scope of *Illinois Brick* in terms that are fatal to respondents' contentions.

Even in the antitrust arena in which *Illinois Brick* arose, the "passing on" theory has no application to market exclusion claims analogous to petitioners' RICO claims.

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[3] Petitioners' complaints were dismissed under Rule 12, Fed. R. Civ. P., and prior to discovery. All allegations of the complaints must be taken as true in these proceedings.

Nor does this case implicate any of the judicial administration concerns this Court expressed in *Illinois Brick*. There is no issue of apportionment of the same damages among numerous potential plaintiffs; each petitioner is suing for its own unique, direct injury. There is no issue of duplicative or inconsistent damage awards; no one else can sue as an injured MWBE subcontractor. And, even if these concerns were relevant to this case, the class action mechanism would permit appropriate, consistent resolution of damages issues in a single proceeding.

The ease with which respondents transform *Illinois Brick* into a catch-all preclusion of all arguably complex damage calculations, and of all arguably "indirect" injuries in non-price RICO cases, amply demonstrates the need for this Court's intercession.

2. Another indication of the necessity for further review is respondents' effort to read the word "business" out of the statutory phrase "business or property." 18 U.S.C. § 1964(c).

There is no doubt that exclusion or foreclosure from competition constitutes injury to business within the meaning of the Clayton Act.[4] The same result should obtain within the meaning of the identical words in RICO,

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[4] *See Central Telecommunications, Inc. v. TCI Cablevision*, Inc., 800 F.2d 711, 727 (8th Cir. 1986) (loss of business opportunity constitutes injury to business under antitrust law), *cert. denied*, 480 U.S. 910 (1987); *Parks v. Watson*, 716 F.2d 646, 659-60 (9th Cir. 1983) (party who is precluded from entering industry has suffered an ascertainable loss).

and this Court has so stated.[5] Subsequent to the filing of the petition for a writ of certiorari in this case, the Eighth Circuit reconfirmed that, contrary to the decision below, allegations of lost business opportunity due to defendants' RICO violations satisfy the injury requirement for RICO standing. *Bieter Co. v. Blomquist*, No. 92-2018, 993 WL 59170, at *9 (8th Cir. filed Mar. 8, 1993). The Eighth Circuit stated (*id.*):

> Defendants argue that this is simply a lost opportunity, not the sort of actual, concrete injury for which RICO was designed. We do not question that the precise degree of [plaintiff's] injury is somewhat speculative, but it is simply the periphery, and not the core, which we so describe. [Plaintiff] was injured.

The conflict that existed among the courts of appeals when the petition was filed has thus become even more pronounced, creating even greater uncertainty on the question whether allegations of lost business opportunity are sufficient to satisfy the injury requirement of RICO

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[5] *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 n.15 (1985) (enhanced commercial position of competitors gained by unlawful activity may give rise to RICO action); *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988) (plaintiff sufficiently alleged injury for purposes of RICO standing despite defendants' argument that plaintiff failed to plead that it would have received the contract but for defendants' illegal conduct), *aff'd on other grounds*, 493 U.S. 400 (1990).

standing. Review by this Court is necessary to resolve that conflict.[6]

Because respondents' unlawful scheme was directed at circumventing set-asides and excluding MWBEs from participation in public works projects, the decision below denies a remedy to the parties most directly and clearly injured by the RICO violations alleged in the pleadings. The pretextual rationales advanced by respondents demonstrate that unless the decision below is reversed, the remedy Congress prescribed will be denied by substituting the superficiality of labels for the substance of analysis and accurate classification.

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[6] There is no merit to respondents' contention that petitioners lack Article III standing to assert their RICO claims. Respondents confuse the constitutional aspect of standing with the statutory aspect of standing. In any event, if there is an issue in this case concerning Article III standing to challenge abuses of set-aside requirements, then the correct disposition would be to hold this case pending this Court's decision in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, No. 91-1721, which was argued on February 22, 1993.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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